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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 234

FEDERAL TRADE COMMISSION, *Petitioner,*

v.

MANDEL BROTHERS, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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INDEX

	Page
Questions presented	2
Statement of the case	2
Argument	4
Conclusion	17

CITATIONS

CASES:

DeGorter v. *Federal Trade Commission*, 244 F. 2d 270	12
National Labor Relations Board v. *Express Publishing Company*, 312 U.S. 426	16
Siegel Company v. *Federal Trade Commission*, 327 U.S. 608	14

STATUTES:

Fur Products Labeling Act, 65 Stat. 175, 15 U.S.C. 69 *et seq.*:	
Section 2(f)	4
Section 4(2)	12

MISCELLANEOUS:

Rules and Regulations under the Fur Products Labeling Act, Title 16 C.F.R. 301	3
Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 3734, 80th Congress	8
Hearings before Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 97 and H.R. 3755, 81st Congress	10
Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2321, 82d Congress	9, 10
House Report No. 2004, 80th Congress	9
House Report No. 919, 81st Congress	9, 10
House Report No. 546, 82d Congress	9, 10
Senate Report No. 2378, 81st Congress	9, 10
Senate Report No 78, 82d Congress	9, 10

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RESPONDENT'S BRIEF IN OPPOSITION

Mandel Brothers, Inc., submits that the court below did not err in its conclusions on the questions here involved, that its holdings on those issues do not frustrate the purposes of the Fur Products Labeling Act, that there is no question requiring review by this Court, and that the petition for certiorari should be denied.

QUESTIONS PRESENTED

The respondent respectfully suggests that the questions presented in this proceeding may be more accurately stated as:

1. Whether the sale slip given to the consumer upon the purchase of a fur product at retail is within the definition of "invoice" in the Fur Products Labeling Act.

2. Whether the Federal Trade Commission, in issuing cease and desist orders against failure to label fur products properly, may proscribe labeling omissions of which it has concurrently "acquitted" the respondent.

STATEMENT OF THE CASE

The petition's statement of the case appears to be adequate for purposes of this proceeding, except for certain details in the portion dealing with the proper scope of the order with respect to labeling violations. In the following paragraphs, we suggest two changes and state reasons therefor.

A. The second issue herein is whether the Commission properly included in its cease and desist order specific proscription of labeling deficiencies which it found had not been committed. It was found that certain labeling omissions had occurred. The quality and character of those omissions may aid in estimating the probability of occurrence of other omissions which had not previously occurred, and thus may bear upon the propriety of enjoining omissions of the latter type. Accordingly, the respondent would amplify the first sentence in the first full paragraph on page 5 of the petition so as to set forth the following information:

The Commission found 12 instances of failure to label the product with the correct name of the animal producing the fur. They consisted of garments which were labeled "black seal" or "Alaska seal" instead of "fur seal"; "Persian" instead of "Persian lamb"; "tropical seal" instead of "hair seal"; and "Stuart hybrid" or "silver blue" instead of "mink." On one "dyed fox" garment, the species of fox was not named. (App. 18, 19)

The Commission found 15 instances of failure to disclose that the product was bleached, dyed or otherwise artificially colored. They included garments which were labeled as "black seal" or "black Persian lamb" without reference to having been dyed; there was testimony that those furs are not used commercially in black in their natural state, but are invariably dyed. Five muskrat coats bore no reference to having been dyed. Four mole jackets were labeled as "tipped" instead of "dyed" or "tip dyed." (App. 20)

The Commission found 58 instances of failure to show the country of origin of imported furs. These consisted of about 15 cases where fur origin was omitted; a few garments on which the fur origin was stated in adjective form, e.g., "Russian" instead of "fur origin: Russia"; and 37 coats on which the fur origin was stated as "Outer Mongolia." The criticism on the last group was that Outer Mongolia is not a country but is a part of China.* (App. 19, 20)

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*Compare the Commission's Rule 12(b): "The term 'country' means the political entity known as a nation. Colonies, possessions or protectorates outside the boundaries of the mother country shall be considered separate countries and the name thereof shall be

B. The first sentence in the first full paragraph on page 6 of the petition, describing the cease and desist order, may fail to make it clear that the order proceeded to name each of the six categories of information without which a label is deficient, i.e., the three in which deficiencies had been found and also the three in which deficiencies had been not found. In the interest of complete accuracy, that sentence should read:

> Although the examiner recommended that the cease and desist order be limited to the three categories of information found to have been omitted, the Commission's order directed respondent to cease and desist from "Misbranding fur products by: 1. Failing to affix labels to fur products showing: * * *" followed by a particularization of each of the six categories of information required by section 4 (2) of the Act.

ARGUMENT

I

The court below properly held that the mandatory invoicing requirements of the Fur Products Labeling Act do not extend to retail sale slips.

The sale slip which a customer may receive at the time of a retail purchase in a department store certainly does not fall within the common concept of the term "invoice." That term is ordinarily used at wholly different stages of the commercial process.

Correspondingly, a retail sale slip does not fall within the Fur Act's definition of "invoice." Section 2(f) of that Act (15 U.S.C. 69(f)) provides:

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deemed acceptable in designating the 'country of origin' unless the Commission shall otherwise direct." (Rules and Regulations under the Fur Products Labeling Act, Title 16 C.F.R. 301.)

> The term "invoice" means a written account, memorandum, list, or catalog, which is issued *in connection with any commercial dealing* in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a *purchaser,* consignee, factor, bailee, correspondent, or agent, or *any other person* who is engaged in *dealing commercially* in fur products or furs. (Emphasis supplied.)

This definition is specific. Its plain meaning is that there is a statutory invoice only where the purchaser (or consignee, etc.) is a person who is dealing commercially. The qualification on the nature of the transaction is emphasized by the repetition of the "commercial" phrase. The statute requires not only that the invoice be a writing issued in connection with commercial dealing, but it must also be issued to a person who is dealing commercially. If unlimited scope had been desired, the definition could have been greatly simplified. But the very completeness of its detail demonstrates a design to apply to a narrow class.

That clear language of the definition is wholly consonant with the Act's purpose to protect the consumer from deception in her purchase of fur products. The scheme of the Act is to insure that complete and correct information is available to her at the point of purchase—it requires that the garment carry a fully detailed label.

The retail purchaser's protection is the label on the fur product. She has the garment before her, she has had an opportunity to see the label, and she has decided upon the purchase—all before the sale slip is prepared. The sale has been agreed upon and the transaction is concluded. The sale slip can add nothing to

her knowledge of the garment; its only function for her will be in connection with paying the bill.

On the other hand, a useful purpose may be served by application of the invoicing requirements to the chain of transactions whereby the goods come to the retailer. With the required information before him on the invoice, the retailer is in a position to see that a proper label is affixed to the garment.

We submit, therefore, that the Act's definition of invoice does not include the sale slip which may be given at the time of the purchase to the ultimate consumer.

The court below found no room for doubt, but declared the Fur Act's definition of invoice to be "plain and unambiguous." The court aptly said:

> * * * when the statute says purchaser or any *other* person who is so engaged [in dealing commercially in fur products or furs] the limitation clearly applies to *purchaser*. No other meaning is possible particularly when "invoice" is also defined by the Act as something *which is issued in connection with any commercial dealing* in fur products or furs. (Appendix A to petition for certiorari, p. 20.)

A sale slip at the retailer-customer level is not an invoice within the Act.

The Court of Appeals held the statutory meaning to be so clear as to preclude resort to legislative history. However, even if the history of the Fur Products Labeling Act were deemed pertinent, it would be found to give strong support to the conclusion which that court reached. The history demonstrates an intent in complete harmony with the interpretation which the

court below gave to "invoice." From its very inception, the legislation is described as putting its major emphasis on the invoicing of furs (not yet manufactured into garments) and on the labeling of fur products.

The Fur Act which became law in the 82d Congress had its precursor in H.R. 3734 in the 80th Congress. The House Committee on Interstate and Foreign Commerce held hearings and reported the bill, but matters went no further in that session. In the 81st Congress, bills quite similar to the present Act, H.R. 97 and H.R. 3755, were the subject of hearings by the same Committee, and a "clean" bill, H.R. 5187, was reported out. It passed the House, was reported in the Senate, and stood on the Senate calendar at adjournment. In the 82d Congress, the bill was H.R. 2321. The same Committee held hearings, and the bill was reported and passed the House. Meantime, the Senate Committee on Interstate and Foreign Commerce had reported its own S. 508, similar to H. R. 5187 of the preceding Congress. The language of S. 508 was substituted in H.R. 2321 in the Senate and thus passed. After conference, it became the present Fur Products Labeling Act.

As we have pointed out, the first bill in the series was H.R. 3734, in the 80th Congress. The petition for certiorari, in a footnote on page 10, refers to discussions of invoicing in the hearing on that bill. The concluding witness at the hearing was Henry Miller, the Federal Trade Commission's Director of Trade Practice Conferences and Wool Act Administration. Mr. Miller testified as follows:

> Representations have been made here about the invoice. Now, having a good invoice is a help. I

feel, however, that it by no means can reach a situation as simply and as effectively as a tag.

An invoice is a thing that takes place after the sale has been consummated. It is locking the barn door after the horse has been stolen, in a way.

A label is prophylactic; it is preventive. The consumer comes in, and she sees a whole rack of coats there. She may be in doubt as to what she wants to buy. Some of them are not in doubt. Some come in there, and they ask for a particular type of coat. When they see the label they are apt to be apprised of the truth at the time.

It is important to them to have the truth before they actually make the contract to purchase.

With all due respect to the fact that a good invoice is a good thing to have, I feel that a good label on the product itself simply giving the truth is a more effective remedy.

It is not an easy thing for a retailer, a retail store, to sit down and execute an invoice for every purchase. A manufacturer sends invoices because he ships in quantity. But a retail store will make many sales during the day, and it would be rather irksome and cumbersome, I think—I fear—if the retail store were required to execute an invoice at every sale at the time of sale.

Someone may say, "They can mail the invoice a little later." That is possible. But there again, I say the whole thing involves considerable more effort, considerable more machinery, than to have a simple tag on the article itself. (Hearing before the House Committee on Interstate and Foreign Commerce on H.R. 3734, 80th Congress, at page 202.)

The Committee's report on that initial bill said:

With respect to furs, the information required by this legislation is to be passed on by the means

> of invoices. In respect to fur products, labeling is required which begins with the manufacturer of the fur product. Removal of the manufacturer's label is forbidden until the article reaches the ultimate consumer. (House Report No. 2004, 80th Congress, page 3.)

Four committee reports, in the 81st and 82d Congresses, describe the legislation as requiring:

> * * * mandatory invoicing of furs and labeling of fur products moving in interstate or foreign commerce * * *

or, a slightly different wording:

> * * * mandatory labeling of fur articles of wearing apparel and invoicing of furs moving in interstate or foreign commerce * * *. (House Report No. 919, 81st Congress, page 1; House Report No. 546, 82d Congress, pages 1-2; Senate Report No. 2378, 81st Congress, page 1; Senate Report No. 78, 82d Congress, page 2.)

The original author and sponsor of the fur legislation, Representative Joseph P. O'Hara, testified in 1951 at the hearings on the bill which was ultimately enacted. He said:

> The remedy suggested in this bill is the mandatory invoicing of furs and the mandatory labeling of fur products moving in interstate or foreign commerce under the usual name of the animal that produced the fur. (Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2321, 82d Congress, at page 13.)

Congressional committees customarily invite the interested agencies to comment on pending bills. During 1949 and 1951, the Federal Trade Commission

wrote no less than six reports to the committees analyzing and commenting on the various fur bills mentioned above. Each one of those reports describes the legislation as requiring labeling of fur products or articles of wearing apparel, and requiring "invoicing of furs." (Hearings before Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 97 and H.R. 3755, 81st Congress, pages 28 and 30; Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2321, 82d Congress, page 6; House Report No. 919, 81st Congress, pages 5 and 6; Senate Report No. 2378, 81st Congress, page 5; House Report No. 546, 82d Congress, page 5; Senate Report No. 78, 82d Congress, page 5.)

The foregoing history shows beyond question that the desired protection for the consumer was to be achieved by requiring a label on the fur product. Stress was laid on invoicing furs so that, when they were manufactured into a garment, the information would be available for a proper label.

Moreover, this historical background confirms the view which we expressed at the outset of this discussion, that the construction of the Act made by the Court of Appeals does not at all frustrate the purpose of the Act—to insure disclosure of essential facts to the consumer. A technically detailed label on the garment at the time of purchase offers needed information and valuable protection to the woman buying the garment. But a technically detailed invoice to her after the purchase has been made would add no benefit for her and would be a needless burden on the retailer.

The petition alleges that the construction of "invoice" by the court below will "substantially limit the protection against misbranding afforded by Congress to purchasers of fur products." (Petition, page 7). There is no discusison of how such a result might follow, and no explanation is apparent. The "protection against misbranding" is achieved in the Act by requiring that a fur product bear a *label* showing specified details about the garment. That requirement of a label is not affected by the holding that the sale slip does not have to set forth the details required to be shown on a statutory invoice.

The petition for certiorari relies on the claim that the Commission has consistently construed the statute's invoicing requirements to apply to the sale slip furnished by the retailer to the consumer upon the purchase of a fur product. When the Commission may have espoused that construction does not appear, but it is clear that such was not the view of the Commission while the legislation was under consideration in Congress. We have referred above to repeated reports from the Commission to Congressional committees, which reports uniformly described the legislation as requiring that furs be invoiced, but that fur products should be labeled. The consistent construction for which the petition contends does not exist.

Furthermore, even a consistent construction is of doubtful weight when it is unilateral and not tested by challenge. Almost all of the Fur Act proceedings instituted by the Commission have been closed by agreed orders. So far as we can learn, this case is the first one in which a respondent has seriously contested the present issue. This case is only the second Fur Act case to be litigated; the first one was *DeGorter* v.

Federal Trade Commission, 244 F. 2d 270, C.A. 9, which presented neither one of the issues here in controversy.

We submit that the court below correctly construed the Act, that its construction does not thwart the purposes of the Act, and that there is no question requiring review by this Court.

II

The second allegation of error in the petition has to do with the proper scope of the Commission's cease and desist order with respect to labeling of fur products.

Section 4(2) of the Fur Act (15 U.S.C. 69b) specifies six items which must appear on the label on a fur product: the animal name, in conformity with the official Name Guide; that the product contains used fur, when such is the fact; that the fur is dyed, when such is the fact; that the product contains inferior parts of fur, when such is the fact; the name or registered number of the manufacturer or vendor; and the country of origin of imported fur. The Commission found that there was no evidence that respondent had violated the Act by omitting disclosure of the presence of used fur or inferior parts of fur or omitting the name of the vendor. Yet it enjoined the omission of all six requirements, separately enumerating each one.

Respondent objected to the prohibition of violations of which it had been acquitted, not because it expects to commit those violations but because any prohibition in a cease and desist order inevitably means to the public that the prohibited violation has been committed. It is of major importance to Mandel Brothers

hat no order suggest that the store has sold garments ontaining used fur or inferior parts of fur and has oncealed the fact.

The Court of Appeals rejected so much of the Commission's order as directed respondent to cease omitting from labels the items which the Commission found had not been omitted.

At the outset of its discussion of this issue, the petition for certiorari incorrectly reflects the holding of the court below. The petition (at page 11) says that the court "erred in holding that Commission cease-and-desist orders under the Fur Products Labeling Act may prohibit only the particular types of misbranding * * * found to have been committed." The court below did not so hold.

In its opinion, the Court of Appeals said:

> * * * We find no difficulty in subscribing to the doctrine that a cease and desist order does not have to be limited to the illegal practice in the precise form it is found to exist or that those caught violating the Act must expect some fencing in but we cannot affirm an order requiring one to cease and desist from doing that which the Commission specifically found it did not do. Appendix A to petition for certiorari, pp. 18-19.)

The court specifically recognized that Commission orders do not have to be limited to the particular violations found to have been committed. The only limitation imposed by the court below is a narrow one—consonant with every fundamental of our jurisprudence—that the Commission may not enjoin one from doing what it has found one did not do. No legitimate scope of Commission orders is inhibited.

The Court of Appeals did not deny to the Commission its "wide discretion" in remedying unlawful practices disclosed in its proceedings; it did not limit the Commission "to prohibiting the illegal practice in the precise form in which it is found to have existed." It held merely that, where the unlawful or illegal practice was found not to have existed, the Commission could not enjoin it.

In view of the more serious nature of two of the violations of which respondent was acquitted, and the obvious effect on customers of a suggestion that they had occurred, it was perhaps an abuse of discretion for the Commission to enjoin them. Compare the holding in *Siegel Company* v. *Federal Trade Commission*, 327 U.S. 608, where this Court held that the Commission should have considered whether some change of name or some qualifying language would have been sufficient to satisfy the law and still not destroy Siegel's "Alpacuna" trade name. In the case at bar, the Commission made no finding of resemblance to the violations which were found proved, and no finding that past conduct threatened the committing in the future of violations found not to have been committed in the past.

It is quite impossible to see how the Court of Appeals decision on this point would impede the Commission in any proper function. The way is open for prohibiting whatever illegal activities may have been disclosed, together with related variations on those activities. The only "fencing in" of the Commission is that it may not require one "to cease and desist from doing that which the Commission specifically found it did not do."

The petition for certiorari argues at one point that the requirements of section 4(2) of the Act constitute "six categories of misbranding" and that they are so interrelated as to presage that a violator of some categories will, unless restrained, violate others. The Commission did not justify its order with any such forecast and made no finding which would support it. In view of the varying degrees of reprehensibility of the several categories, to assume such a prospect would be unwarranted. The occurrence of violations which are almost technical in quality affords no basis for sound expectation that there will occur other violations of a definitely misleading nature. Moreover, a respondent who is under an order to label properly, with specific enumeration of the three items wherein he has been found delinquent, is hardly likely to risk further proceedings by violating the other three categories in which he has once been found not remiss.

At another point, the petition contends that the six categories do not give rise to separate violations; that the failure to attach a label containing all of the data specified by section 4(2) of the Act is a unitary violation. If that be the correct interpretation, then it was superfluous for the Commission's order to enumerate all of the six categories; a proper order would have been to "cease and desist from misbranding fur products by failing to affix labels to fur products showing all of the information required by section 4(2) of the Fur Products Labeling Act." Such an order is not inhibited by the decision of the Court of Appeals herein, and the fact of its availability is a complete answer to any contention that the Commission is handicapped in enforcing the laws within its jurisdiction.

The petition, at page 13, complains that under the decision below the Commission would have to bring new proceedings to deal with subsequent violations not theretofore resorted to. But the advantage of avoiding "multiplicity of actions" cannot warrant the enjoining of violations at large, and *a fortiori* cannot warrant enjoining violations which were found not to have occurred. As this Court said in *National Labor Relations Board* v. *Express Publishing Company*, 312 U.S. 426, 433, 437:

> It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.
>
> * * *
>
> We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found.

The respondent submits that the court below did not err, that its holding will in no wise frustrate the purposes of the Fur Act or handicap the Commission in enforcing the Act, and that there is no question requiring review by this Court.

CONCLUSION

r the foregoing reasons, it is respectfully sub-
ed that the petition for a writ of certiorari should
enied.

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